

# Assignments of Book Debts – outright transfers of rights or unregistered securities?

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*Businesses are increasingly being financed by receivables financiers who take assignments of a company's book debts. The receivables finance industry is estimated to be worth over €1.6 trillion across Europe with the U.K. market leading the way. In the event that the company goes bust, the assigned book debts are swept away by the financier, as legal owner, and consequently what is often the only significant asset of a company is not available to the general body of creditors.*

*The financier will either give notice to the debtor at the time of taking the assignment ("debt factoring") or delay such notice until sometime later ("invoice discounting"). The accepted wisdom is that such agreements are absolute assignments and not security interests and therefore do not require registration under the Companies Act 2006.*

*This article considers the history of assignments of book debts and suggests that an equitable assignment of a debt is not an out-and-out transfer of the debt but operates by way of charge. Such an agreement is therefore a security interest which is void against other creditors without registration. Although the invoice discounter may convert the equitable assignment into a legal assignment by giving notice to the debtor, if that notice is subsequent to the commencement of a formal insolvency process, that notice will be of no effect.*

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## I. INTRODUCTION

In recent years, those providing finance to a trading company have increasingly looked to take an absolute assignment of debts owed to the company. Those financiers can realise the assigned debts in their own right and for their own benefit if the company in question becomes insolvent. The debt has been transferred and therefore belongs to the financier rather than the company. Although it is clear that a legal assignment of a debt transfers absolute ownership of the debt to the assignee, there remain questions as to whether equitable assignments, which are frequently taken by financiers, also have this effect.

The purpose of this article is to consider the nature of equitable assignments of legal *choses in action*<sup>1</sup> (typically book debts<sup>2</sup> owed to a company).<sup>3</sup> It will be necessary to consider some of the problems afflicting law and equity leading up to the Judicature Act 1873<sup>4</sup> and, in the context of assignments, the conundrum created by the wording of that Act. It is clear that the introduction of the legal assignment in 1873 did not impact upon the operation and efficacy of equitable assignments.<sup>5</sup> It will be suggested that an equitable assignment of a debt does not transfer absolute ownership rights to the assignee but merely creates an equitable charge over the debt.<sup>6</sup> An equitable charge is a form of security interest where no title, legal or equitable, passes to the assignee. If it is not registered under the Companies Act 2006, it is void against a company's other creditors.<sup>7</sup>

Although the nature of equitable assignments is of academic interest to students of contract law, it is also of enormous practical relevance to many who provide business finance. There is a wide global debate on what constitutes a security interest and whether, to ensure transparency and certainty, such interests should be subject to registration.<sup>8</sup> The article will begin by explaining how a great many UK companies are today provided with finance on the basis that they assign their book debts to a financier. The reasons for the recent popularity of this type of financing agreement will be explained as will the different types of assignments which may be taken. The distinction between legal and equitable

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<sup>1</sup> This term is adopted throughout the article to signify a right to bring an action at law rather than in Equity.

<sup>2</sup> A company's "book debts" are generally defined as including those debts which, in the ordinary course of business, would be entered in well-kept books of a company (see *Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch 348).

<sup>3</sup> For a clear exposition of the law generally upon equitable and legal assignments of *choses in action* see eg E. Peel *Treitel on the Law of Contract* (14<sup>th</sup> ed London: Sweet and Maxwell, 2015) Chapter 15.

<sup>4</sup> Supreme Court of Judicature Act 1873 (36 & 37 Vict, c 66).

<sup>5</sup> *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461.

<sup>6</sup> Building upon the excellent work of J. Edelman and S. Elliott "Two conceptions of equitable assignment" (2015) 131 *Law Quarterly Review* 228 discussed below in Part IV.

<sup>7</sup> It is assumed for the purposes of this article that such assignments are not exempt from Companies Act registration requirements under the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) as amended. For a consideration of the Regulations and how they may exclude some assignments of, or charges over, book debts, from the registration requirements of the Companies Act 2006, see eg R. Calnan *Taking Security Law and Practice* (2<sup>nd</sup> ed Bristol: Jordans, 2011) at paras 3.288 – 3.300 6.83-6.87 and L. Gullifer and J. Payne *Corporate Finance Law* (2<sup>nd</sup> ed Oxford: Hart, 2015) at 7.3.4.

<sup>8</sup> See, for example, the UNCITRAL *Guide on the Implementation of a Security Rights Registry* (2014) found at: <http://www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf> (last accessed 7<sup>th</sup> September 2018) and the UNCITRAL *Model Law on Secured Transactions* (2016) at: [http://www.uncitral.org/pdf/english/texts/security/ML\\_ST\\_E\\_ebook.pdf](http://www.uncitral.org/pdf/english/texts/security/ML_ST_E_ebook.pdf) (last accessed 7<sup>th</sup> September 2018). Many countries around the world have adopted a personal property secured transactions registration system based on the UNCITRAL model law or similar (see, for example, Kenya's Movable Property Security Rights Act 2017). Closer to home useful reference may be made to the Discussion Draft Secured Transactions Code and Commentary produced by the City of London Law Society Financial Law Committee found at: <http://www.citysolicitors.org.uk/attachments/article/121/Draft%20Secured%20Transaction%20Code%20-%20Commentary%20-%20July%202016.pdf> (last accessed 7<sup>th</sup> September 2018).

assignments will be explored with reference to case law, legislation and commentaries. The nature of the rights given to an equitable assignee will be contrasted with those of a legal assignee, specifically in the context of the formal insolvency of the assignor.

## II. MODERN BUSINESS FINANCE

Businesses need finance. Although the way in which finance has been made available to businesses has changed over the centuries, some fundamental principles remain unaltered. Those providing finance will always wish to protect themselves in the event that the business fails. One significant recent development has been the reaction by banks to the effective loss of their fixed charge on book debts.<sup>9</sup> In modern trading conditions, the only asset which many companies are able to offer to banks as security is their ledger of book debts (current and future).

As it is now not usually feasible for a lender effectively to police a fixed charge on book debts,<sup>10</sup> the banks have in recent years moved away from taking security over book debts towards purchasing book debts at a price less than the book value of the debts.<sup>11</sup> This process involves taking absolute assignments of book debts which purport to effect a transfer of the debts to the finance provider. No security is taken and so there is no requirement to register the assignment under the Companies Act 2006.<sup>12</sup>

There is no requirement for an equitable assignee to publicise the assignment at all and so the arrangement remains secret.<sup>13</sup> If a company becomes financially distressed, an equitable assignee of debts simply gives notice of the assignment to the debtors, which notice will usually convert the equitable assignment into a legal assignment. The assignee, as absolute owner, then collects the outstanding debts without sharing the proceeds with other creditors or contributing to the professional fees incurred in the insolvency process.

The action by the equitable assignee to convert its interest into an absolute legal assignment by notice to the debtor is effective as long as the assignor has not yet entered formal insolvency proceedings such as administration or compulsory liquidation. Once in administration or compulsory liquidation the respective statutory moratoria contained within those regimes appear to prevent the conversion of the equitable assignment into a legal assignment.<sup>14</sup> If the equitable assignment has not yet been converted into a legal assignment, the assignee remains an equitable assignee. If an equitable assignment does not operate as an absolute transfer of ownership of the debt, the interest held by an equitable assignee is not

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<sup>9</sup> *Re Brumark Investments Ltd* [2001] 2 AC 710 and *Re Spectrum Plus Ltd* [2005] 2 AC 680 overruled the legitimacy of the previous common practice of banks taking fixed charges over book debts. See eg A. Berg “The cuckoo in the nest of corporate insolvency: some aspects of the Spectrum case” [2006] *Journal of Business Law* 22 and R. Gregory and P. Walton “Spectrum Plus – common law makes takeover bid for equity” [2005] 13 *Sweet and Maxwell’s Company Law Newsletter* 1.

<sup>10</sup> For an example where the lender was able to display sufficient control over the debts to establish a fixed charge see *Re Harmony Care Homes Ltd* [2010] BCC 358.

<sup>11</sup> See the discussion in P. Walton “Fixed and Floating Charges: the Great British fund-off?” (2015) 8 *Corporate Rescue and Insolvency* 18 and (2015) 30 *Butterworths Journal of International Banking and Financial Law* 3.

<sup>12</sup> Part 25 of the Companies Act 2006 generally requires registration of security interests over company assets. The U.K. has no general system of registration of interests over personal property such as that found in the U.S. Article 9 of the Uniform Commercial Code, versions of which have been adopted by, for example, New Zealand, Australia and the common law provinces of Canada. The UNCITRAL Model Law on Secured Transactions contains similar provisions.

<sup>13</sup> For a consideration of the historical Parliamentary objections to secret devices being used to provide a creditor with priority in a debtor’s insolvency see P. Walton “Fixed and Floating Charges: the Great British fund-off?” (2015) 8 *Corporate Rescue and Insolvency* 18 and (2015) 30 *Butterworths Journal of International Banking and Financial Law* 3.

<sup>14</sup> See respectively paras 42 and 43 of Sch B1 and s 127 of the Insolvency Act 1986.

that of an absolute owner of the debt. If that interest is an equitable charge (as will be argued below), it will fail, on the formal insolvency of the assignor, as an unregistered charge.<sup>15</sup>

### III. DEBT FACTORING AND INVOICE DISCOUNTING

Commercial law developments are a response to commercial needs.<sup>16</sup> Until the mid-nineteenth century unincorporated businesses were financed by way of loans typically secured by bills of sale over chattels and debts. Such bills of sale were either in the form of absolute transfers of assets or mortgages<sup>17</sup> of those assets. Borrowing on the security of bills of sale suffered from a number of weaknesses largely due to their being capable of being attacked under various statutes.<sup>18</sup> It was, of course, possible to incorporate a business by obtaining a Royal Charter or by private Act of Parliament if the proposed undertaking was significant.<sup>19</sup> Following the passing of the various Companies Acts<sup>20</sup> in the middle part of the nineteenth century, registered companies, with the benefit of limited liability, became a more common business medium. Companies required finance and over time it became common for such companies to borrow on the security of a floating charge.<sup>21</sup> The floating charge remains a cornerstone of much corporate lending today.

It can be seen that since the late nineteenth century, financiers developed various practices designed to maintain maximum protection for their interests, including taking security over book debts. The courts<sup>22</sup> and Parliament reacted to these developments by trying to maintain a reasonable balance between the competing interests of those claiming an interest in a company's book debts. Restrictions have been imposed to ensure that the interests of financiers are balanced with the interests of other stakeholders in a business, such as unsecured creditors.<sup>23</sup>

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<sup>15</sup> Although it is beyond the scope of this article, its conclusions may also have an impact upon securitisations of debts which, if subject to English law, will often rely upon equitable assignments of the securitised debt (see eg A. Haynes "Companies and finance, Editorial" (2015) 36 *Company Lawyer* 325 and *Titan Europe 2006-3 plc v Colliers International UK plc* [2015] EWCA Civ 1083). Such assignments will potentially be void for non-registration under the Companies Act 2006 but may fall within the concept of financial collateral in which case registration will not be required under the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) as amended.

<sup>16</sup> R. Goode "The Exodus of the Floating Charge" *Corporate and Commercial Law: Modern Developments* (ed. Feldman and Meisel) (London: Lloyds of London, 1996) 193 at 193.

<sup>17</sup> See eg *Ex parte Games* (1879) 12 Ch D 314.

<sup>18</sup> Notably the various Bankruptcy Acts dating from 1623 (21 Jac I, c 19) and the Statute of Elizabeth 1570 (13 Eliz I, c 5). Generally, if assets such as debts were left in the possession or control of an individual, any secret assignment of such debts was generally capable of being attacked on the grounds that creditors were misled into believing the individual was the beneficial owner of such debts. The appearance of unencumbered ownership of such debts provided a delusive credit. See eg the discussion in R. Gregory and P. Walton "Fixed Charges over Changing Assets - The Possession and Control Heresy" (1998) 2 *Company, Financial and Insolvency Law Review* 68.

<sup>19</sup> See eg the discussions in G. Todd "Some Aspects of Joint Stock Companies, 1844-1900" (1932) 4 *Economic History Review* 46; R. Pennington "The Genesis of the Floating Charge" (1960) 23 *Modern Law Review* 630 and R. Gregory and P. Walton "Fixed and Floating Charges - a Revelation" [2001] *Lloyd's Maritime and Commercial Law Quarterly* 123.

<sup>20</sup> See mainly Joint Stock Companies Act 1844 (7 & 8 Vict, c 110), Limited Liability Act 1855 (18 & 19 Vict, c 133), Joint Stock Companies Act 1856 (19 & 20 Vict, c 47) and Companies Act 1862 (25 & 26 Vict, c 89)

<sup>21</sup> See eg R. Pennington "The Genesis of the Floating Charge" (1960) 23 *Modern Law Review* 630 and R. Gregory and P. Walton "Fixed and Floating Charges - a Revelation" [2001] *Lloyd's Maritime and Commercial Law Quarterly* 123.

<sup>22</sup> See eg *Re Brumark Investments Ltd* [2001] 2 AC 710 and *Re Spectrum Plus Ltd* [2005] 2 AC 680 which imposed significant hurdles in the way of lenders being able effectively to take fixed charges over book debts.

<sup>23</sup> A list of statutory restrictions on secured creditors' interests would include: the Bills of Sale Act 1854 (17 & 18 Vict, c 36) which made security bills of sale publicly registrable with the intention of preventing fraudulent

Attempts by those providing finance to companies to create a more effective priority than the one provided by a floating charge, were successful in the late part of the twentieth century when banks frequently benefitted from fixed charges on book debts.<sup>24</sup> The twenty-first century has seen a decline in fixed charges over book debts which have often been replaced by financiers requiring an assignment of book debts.

Finance providers who take assignments of book debts usually do so in one of two, very similar, ways: 1) as debt factors or; 2) as invoice discounters. In outline terms, a debt factor will take an assignment of the company's complete debt ledger and give notice to the debtors that the debts have been assigned. An invoice discounter will do essentially the same thing but will not provide notice to the debtors unless and until the company becomes insolvent (or some other significant occurrence happens).<sup>25</sup>

Until the Judicature Act 1873, debts (and, generally, other *choses in action*) could only be assigned in equity. Section 25(6) of the Judicature Act 1873 (now found in substantially the same form in s 136 of the Law of Property Act 1925) permitted, for the first time, legal assignments. Prior to 1873, an assignee could only enforce an equitable assignment in the common law courts with the co-operation of the assignor or the assistance of a court of equity which would order that an action could be brought on the debt in the common law courts in the name of the assignor.<sup>26</sup> The Judicature Act 1873 changed this by permitting a legal assignment of a *chose in action* which, if effective, transfers all the legal rights in the *chose in action* to the assignee who can enforce the *chose in action* in his or her own name. Under s 136, a legal assignment must be in writing, must be absolute (whether by way of outright transfer or transfer by way of mortgage but not by way of charge) and notice in writing must be given to the debtor.

Debt factors and invoice discounters (which are both types of what are commonly called receivables financiers) rely upon legal assignments under s.136 to prove absolute ownership of their respective assigned debts. Until such time that notice is given to the debtor of the assigned debt, an invoice discounter has the benefit only of an equitable assignment. By giving notice some time after taking the assignment, the invoice discounter converts the equitable assignment into a legal assignment.

The Asset Based Finance Association ("ABFA"), which was integrated into UK Finance in 2017, was previously the separate trade association for companies offering receivables finance in the U.K. and Ireland. ABFA's web presence remains extant at the time of writing. It explains how invoice discounting operates:

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secret bills; the Bankruptcy Act 1914 (4 & 5 Geo 5, c 59) which made a general assignment by an individual (or partnership) of present or future book debts subject to registration under the Bills of Sale Act 1878 (41 & 42 Vict, c 31) (this provision lives on in s 344 Insolvency Act 1986); the Companies Act 1900 (63 & 64 Vict, c 48) (which introduced the requirement for, *inter alia*, floating charges over a company's assets to be registered publicly; the Companies Act 1907 (7 Edw 7, c 50) extended public registration to charges over a company's book debts. For the modern law on registration of company charges see Part 25 Companies Act 2006 (2006 c 46) which requires registration of all company charges subject to some exclusions; see also the prescribed part deduction from floating charge assets in favour of unsecured creditors found in s 176A Insolvency Act 1986 (1986 c 45) introduced by s 252 Enterprise Act 2002 (2002 c 40).

<sup>24</sup> *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Ll Rep 142 was relied upon for over twenty years by banks claiming their purported fixed charges on book debts were valid. *Siebe Gorman* was eventually overruled by the House of Lords in *Re Spectrum Plus Ltd* [2005] 2 AC 680.

<sup>25</sup> See eg Chapters 2 and 3 of F.R. Salinger *Tolly's Factoring A guide to factoring practice and law* (Croydon: Tolley, 1984).

<sup>26</sup> See eg *Cator v Croydon Canal Company* (1843) 4 Y & C 405; 160 ER 1149. The procedure since 1873 is simplified as the administration of the common law and equity is now conducted by a single court which can deal with an action where the debt has been assigned in equity as long as the assignor, assignee and debtor are before the court (*Holt v Heatherfield Trust Ltd* [1942] 2 KB 1).

“Immediate cash is available up to 80/85% of approved invoices. However, responsibility for the sales ledger operation remains with you, and the service is normally undisclosed to customers. Payments that you receive are paid into a bank account administered by the Invoice Discounter, after which you are credited with the balance, less charges.”<sup>27</sup>

The fees deducted by the financier typically comprise an administration charge (which may be a flat monthly fee or a percentage of turnover) and a discount charge which “is likely to be comparable with normal secured bank overdraft rates.”<sup>28</sup> Once the financier has deducted its charges the debt is released back to the company. This type of finance is increasingly popular in the Small and Medium Enterprise market and assists many companies which would otherwise experience severe cash flow problems whilst awaiting payment of outstanding invoices.<sup>29</sup> Receivables financing is on the increase. Data collated by the European Union Federation for the Factoring and Commercial Finance Industry shows that factoring and commercial finance volumes in the EU grew overall in 2017 by 7.5% to €1.6 Trillion with the UK’s turnover being the largest in the EU.<sup>30</sup> The statistics prepared by UK Finance suggest that over 90% of receivables financing is done by way of invoice discounting rather than debt factoring.<sup>31</sup>

Although at first blush the activities of receivables financiers appear to have all the characteristics of a security interest, the Court of Appeal has held in *Welsh Development Agency v Export Finance Co Ltd*,<sup>32</sup> that such matters as the company retaining a right of redemption, by repaying the advance made by the financier along with its fees, are not necessarily inconsistent with an outright transfer of the debts. Consequently, the accepted wisdom is that a debt factoring *or* invoice discounting agreement is a transfer of property not a security interest requiring registration as such under the Companies Act 2006.

It will be suggested below that this accepted wisdom does not fully appreciate the difference between an equitable assignment of a legal *chose in action* and a legal assignment of such a *chose in action*. Cases such as *Welsh Development Agency* may be correctly decided on the basis that a legal assignment of a *chose in action* (such as a book debt) may be seen as an absolute transfer rather than a transfer by way of mortgage and so not registrable under the Companies Act 2006. This does not impact upon the suggestion that an equitable assignment of a legal *chose in action*, without more, transfers no property to the assignee but, in itself creates only an equitable charge over the *chose in action*.

#### IV. NATURE OF EQUITABLE ASSIGNMENTS OF *CHOSSES IN ACTION*

In equity an assignment need not be in writing or communicated to the debtor for it to be enforced.<sup>33</sup> The debtor need not consent to the assignment for it to be effective<sup>34</sup> and will be liable to the assignee if the debtor is given notice of the assignment but proceeds to pay the

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<sup>27</sup> <http://www.abfa.org.uk/About/invoiceDiscounting.asp> (last accessed on 11th June 2018).

<sup>28</sup> Ibid.

<sup>29</sup> [http://www.abfa.org.uk/About/Documents/2016\\_ABFA\\_A5-Booklet\\_web.pdf](http://www.abfa.org.uk/About/Documents/2016_ABFA_A5-Booklet_web.pdf) (last accessed on 11th June 2018). See also H. Beale, L. Gullifer and S. Paterson “A case for interfering with freedom of contract? An empirically-informed study of bans on assignment” [2016] *Journal of Business Law* 203.

<sup>30</sup> <https://euf.eu.com/> (last accessed on 11<sup>th</sup> June 2018).

<sup>31</sup> <https://www.ukfinance.org.uk/wp-content/uploads/2018/01/UK-FINANCE-Asset-based-finance-statisticsQ4-2017.pdf> (last accessed on 11th June 2018).

<sup>32</sup> [1992] BCC 270.

<sup>33</sup> See eg *Walker v Bradford Old Bank* (1884) 12 QBD 511 at 517; *Re General Horticultural Co* (1886) 32 Ch D 512 at 515; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128 at 132; *William Brandt’s Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 and *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5.

<sup>34</sup> *Bell v London and North-Western Railway Co* (1852) 15 Beav. 548; 51 ER 651.

assignor.<sup>35</sup> Notice to the debtor need not be given of the assignment for an assignment to be effective in equity.<sup>36</sup> The danger faced by an assignee in equity, if no notice is given to the debtor, is that the assignment may lose priority to, for example, a subsequent assignee.<sup>37</sup>

Procedurally, prior to the Judicature Act 1873, an equitable assignee needed to file a bill in equity to obtain an injunction *in personam* against an assignor who was unwilling to lend his or her name voluntarily to the proceeding to allow the assignee to use the assignor's name at law (subject to a suitable indemnity to protect the assignor in costs).<sup>38</sup> The modern conventional view is that the requirement for the legal owner to be joined is merely procedural rather than substantive and subject to various safeguards the requirement for the legal owner to be joined may be dispensed with.<sup>39</sup>

(a) *Equitable assignments do not transfer any rights*

Edelman and Elliott<sup>40</sup> convincingly explain the principal characteristics of an equitable assignment. Although the word “assignment” itself suggests a transfer of rights, the learned authors explain that the often accepted wisdom which characterises an equitable assignment as involving a transfer of rights is mistaken.

The learned authors explain that an equitable assignment cannot involve any transfer of any right, legal or equitable. The reason why s 25(6) of the Judicature Act 1873 was passed was because in equity the assignor needed to be a party to any suit to enforce the *chose in action*. The reason why the assignor needed to be a party to the suit was because the legal right being assigned had not been transferred to the assignee. The learned authors explain that it ought still to be necessary, in order for an equitable assignee to enforce an equitable assignment, for the enforcement to be done in the name of the assignor. The assignor remains the legal owner of the *chose in action*. The weight of authority supporting this view is convincing.<sup>41</sup> Legal title to the *chose in action* remains with the assignor and is held for the benefit of the assignee.

Neither is it possible to argue that the equitable assignor is transferring merely an equitable right in a debt. Prior to an equitable assignment of a legal *chose in action* the

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<sup>35</sup> See eg *M’Gowan v Smith* (1857) 26 LJ Ch 8.

<sup>36</sup> *William Brandt’s Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462.

<sup>37</sup> See eg *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128 at 135 and *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 6. Under bankruptcy law prior to the Insolvency Act 1986, assignments of debts were also capable of falling foul of the bankruptcy “order and disposition” clause which dated from s 11 Bankruptcy Act 1623 (21 Jac I, c 19). They were equally capable of being attacked under the fraudulent conveyance provisions of the Statute of Elizabeth 1570 (13 Eliz I, c 5), the preamble to which explains it was intended to invalidate transfers of property made for the “Purpose and Intent, to delay, hinder or defraud Creditors and others of their just and lawful Actions, Suits, Debts”. See generally *Ryall v Rowles* (1749-50) 1 Ves Sen 348; 27 ER 1074.

<sup>38</sup> See eg *Turquand and the Capital and Counties Bank v Fearon* (1879) 4 QBD 280; *Torkington v Magee* [1902] 2 KB 427 at 432; *Re Westerton* [1919] 2 Ch 104 at 113 and *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 3.

<sup>39</sup> See eg *Central Insurance Co Ltd v Seacalf Shipping Corp (The Aiolos)* [1983] 2 Ll Rep 25; *Three Rivers District Council v Bank of England* [1996] QB 292 and *Kapoor v National Westminster Bank plc* [2011] EWCA Civ 1083. If there is generally no need to join the legal owner to such an action, the result would appear to be that there is no difference between an equitable and legal assignment. For a discussion of joinder in this context see G.J. Tolhurst “Equitable assignment of legal rights: a resolution to a conundrum” (2002) 118 *Law Quarterly Review* 98.

<sup>40</sup> J. Edelman and S. Elliott “Two conceptions of equitable assignment” (2015) 131 *Law Quarterly Review* 228.

<sup>41</sup> See eg *Walker v Bradford Old Bank* (1884) 12 QBD 511; *Torkington v Magee* [1902] 2 KB 427; *Re Westerton* [1919] 2 Ch 104 and *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1.

assignor has no equitable rights to transfer. As the House of Lords has previously held,<sup>42</sup> equitable rights do not co-exist with the legal rights of a person who is absolutely entitled. Edelman and Elliott go on to explain:

“[An] equitable assignment is not a *transfer* of rights but it is a *creation* of new rights or powers of the assignee in equity which encumber the existing rights held by the assignor. The assignor holds their rights subject to that equitable encumbrance which generally includes a requirement that the assignor hold the rights for the benefit of the assignee. Many people would describe, and have described, this institution of holding rights for the benefit of another as a trust. For the purposes of this article it does not matter whether the legal institution is described as ‘rights held in equity for the benefit of another’ or as a ‘trust’ although for convenience we will use the language of trust.”<sup>43</sup>

Two significant points may be concluded from Edelman and Elliott. First, an equitable assignment does not cause an absolute transfer of rights in the way a legal assignment does. Secondly, the assignor retains the legal title to the assets assigned and holds the rights subject to an equitable encumbrance in favour of another. An analysis of the exact nature of this mode of holding the legal title on behalf of another was not necessary for the purpose of their thesis but an examination of the exact nature of that “legal institution” is crucial for the purposes of this article.

*(b) Equitable assignments create a trust in the form of an equitable charge*

Although the exact juridical nature of a trust is not free from doubt,<sup>44</sup> the definition suggested by Hart appears wide enough to include an equitable charge: “A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation.”<sup>45</sup>

The characteristics of an equitable charge appear to be entirely consistent with this description. According to Millett LJ (as he then was) it is the essence of an equitable charge “that a particular asset ... is appropriated to the satisfaction of a debt ... so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability.”<sup>46</sup> Lord Hoffman has commented that a “charge is a security interest created without any transfer of title or possession to the beneficiary.”<sup>47</sup> To similar effect, Peter Gibson J explained that a “charge is created by an appropriation of specific property to the discharge of some debt or other obligation without there being any change in ownership either at law or in equity, and it confers on the chargee rights to apply to the court for an order for sale or for the appointment of a receiver....”<sup>48</sup>

From these statements, it is clear that a chargee has a right to have assets realised even though no title or possession of the asset charged has been transferred to the chargee. The chargor remains the legal owner of the asset and the chargee is the beneficiary in equity. An equitable charge imposes an obligation on a person (the chargor) which restricts how he or she may deal with property over which he or she has control in favour of another (the chargee). The chargee may enforce the obligation. The chargor holds the charged assets on trust for the chargee.

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<sup>42</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 706 per Lord Browne-Wilkinson.

<sup>43</sup> J. Edelman and S. Elliott “Two conceptions of equitable assignment” (2015) 131 *Law Quarterly Review* 228 at 231-235.

<sup>44</sup> See eg the recent discussion by Lord Mance in *Akers v Samba Financial Group* [2017] AC 424 at [15].

<sup>45</sup> W.G. Hart “What is a trust?” (1899) 15 *Law Quarterly Review* 294 at 301.

<sup>46</sup> *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508.

<sup>47</sup> *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at 226.

<sup>48</sup> *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 at 227.



Additionally, Lord Browne-Wilkinson has made the following observations about a trust:

“Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property ... other than a purchaser for value of the legal interest without notice.”<sup>49</sup>

Again, this description is consistent with the suggestion that an equitable charge is a form of trust. In the same way as a trust operates, an equitable charge will not bind a purchaser for value of the legal interest without notice.<sup>50</sup>

The proposition that a chargor holds assets on trust for the chargee is an established explanation as to how an equitable charge operates: “a person may create an effective equitable charge over chattels by declaring that he holds them in trust for a creditor by way of security for the payment of a specified debt.”<sup>51</sup> Although this statement referred specifically to chattels rather than *choses in action* this does not affect the general application of the principle.

In order to isolate further the nature of an equitable assignment it is proposed to consider various authorities from around the time of the Judicature Act 1873. As will be seen in the remainder of this part and the next part, a consideration of nineteenth century textbooks, pre-1873 case law and the wording of the Judicature Act 1873 itself, suggest that the equitable interest created in favour of the equitable assignee is an equitable charge.

### (c) *Commentary and case law prior to the Judicature Act 1873*

A leading textbook from 1866 by Joseph Story, *Commentaries on Equity Jurisprudence as administered in England and America*<sup>52</sup> gives the following example:

“[I]f A, having a debt due to him from B, should order it to be paid to C, the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case, a trust would be created in favour of the equitable assignee on the fund, and would constitute an equitable lien upon it.”<sup>53</sup>

It should be pointed out that in this context the use of the word “lien” is “popular and not technical. It properly applies only in respect of goods in the possession of a bailee – not in respect of a mere *chose in action* such as a debt.”<sup>54</sup> Despite this rather non-technical use of the term the concept of a security interest over a *chose in action* was often referred to as a “lien” in the nineteenth century, both by the courts<sup>55</sup> and by Parliament.<sup>56</sup> A lien at common law requires possession to be taken.<sup>57</sup> Equitable liens do not require possession to be taken and it has been recognised judicially that the term “lien” is sometimes used to describe what

<sup>49</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705F.

<sup>50</sup> See eg *Hudston v Viney* [1921] 1 Ch 98.

<sup>51</sup> *Re Bond Worth Ltd* [1980] Ch 228 at 250.

<sup>52</sup> Joseph Story, *Commentaries on Equity Jurisprudence as administered in England and America* (9<sup>th</sup> Ed Vol 2 Boston: Little, Brown and Co, 1866) at para 1044.

<sup>53</sup> See to the same effect (and citing Story), Wardlaw Taylor *Commentaries on Equity Jurisprudence Founded on Story* (Toronto: Willing and Williamson, 1875) at 367-8.

<sup>54</sup> James Stephen *The Common Law Procedure Act 1860 with Practical Notes* (London: Butterworths, 1860) at p. 66. This observation was made in the commentary to s 29 of the 1860 Act which gave a discretion to the courts not to make a garnishee order over a debt under s 61 Common Law Procedure Act 1854 if some third person had “a lien or charge upon it.”

<sup>55</sup> See eg *Barker v St Quintin* (1844) 12 M & W 44; 152 ER 1270 where the labelling of an attorney’s “lien” over a judgment was described as “... perhaps an incorrect expression” and would be better seen as “merely a claim to the equitable interference of the Court to have that judgment held as security for his debt” per Parke B. at 451, 1274. See also *Hough v Edwards* (1856) 26 LJ Ex 55 approving this statement.

<sup>56</sup> See eg s 29 Common Law Procedure Act 1860.

<sup>57</sup> See eg *Gladstone v Birley* (1818) 2 Mer 401; 35 ER 993.

is in fact an equitable charge.<sup>58</sup> In this context the term “lien” equates to “charge” as an interest creating a security interest over the debt assigned without legal title or possession passing to the equitable assignee. Story does not distinguish between equitable assignments of the whole of a debt and part of a debt. Both create an equitable charge in favour of the assignee.

In *Ex parte South*<sup>59</sup> a trader gave an order to one of his creditors, with notice to the debtor’s executors, for the executors to pay the creditor the debt owed once the debtor’s executors had sufficient funds to pay it. The assignment was in the following terms: “Please pay [the creditor] ... £417, 6s as part of the amount due to me for plumber’s work done for the late John Fish esq.” The trader was subsequently made bankrupt. The bankrupt’s estate could not claim the proceeds of the debt which were payable to the creditor. Lord Eldon explained that the “draft was given as a security; the executor retained it in his hands as a charge on the assets”.<sup>60</sup>

In *Diplock v Hammond*<sup>61</sup> there were references by counsel in argument to an equitable assignment of the debt in question being a “lien” upon the money due by the debtor. On the facts, there had been an attempt by the assignor to repudiate the first assignment and to assign to another (after notice had already been given to the debtor). In his judgment, Sir John Stuart VC refers to the first assignment as being an equitable assignment with notice, the effect of which was to give the first assignee priority over the “security”<sup>62</sup> held by the second assignee.<sup>63</sup> On appeal Knight-Bruce LJ (with whom Turner LJ agreed) upheld the decision and referred to the effect of the first assignment as “giving him a preferable lien” to that of the second assignee.<sup>64</sup>

A case where judges referred to the effect of an equitable assignment as creating a lien and a trust is *Collyer v Fallon*.<sup>65</sup> Sir Thomas Plumer MR (who died after judgment but before subsequent proceedings in the same case before the new Master of the Rolls) explained that an equitable assignment was an “order to pay ... an appropriation of the money ... an assignment ... of a chose in action: it created lien, and those, in whose favour it was given, got hold of the fund.”<sup>66</sup> His Lordship’s successor, Lord Gifford MR commented: “The moment, therefore, that the memorandum, directing them to retain a sum ... for the benefit of particular persons, was communicated to them, they became trustees of so much of the fund for the use of the persons thus specified.”<sup>67</sup>

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<sup>58</sup> See eg Slade J in *Re Bond Worth Ltd* [1980] Ch 228 at 250: “I have used the phrase ‘charge’ rather than the word ‘lien,’ because, though the word ‘lien’ is sometimes used in practice to describe a right which arises by way of express contractual agreement of the interested parties, it is more commonly used, in a narrower sense, to refer to a right arising by operation of law.”

<sup>59</sup> (1818) 3 Swanst 393; 36 ER 907.

<sup>60</sup> (1818) 3 Swanst 393 at 394; 36 ER 907 at 908. This case was an appeal from *Ex Parte Alderson* (1815) 1 Mad 53; 56 ER 21 where the draft had originally been held to be a valid equitable assignment. It was there stated that without the complication of the bankruptcy the creditors might “by a bill in equity, have obtained the benefit of the assignment” (at 55; 22) per Sir Thomas Plumer VC. The relevance of this is that assignees could only enforce their rights by bringing an action in a court in equity.

<sup>61</sup> (1854) 2 Sm & Giff 141, 65 ER 339 affirmed on appeal at (1854) 5 DeGM & G 320, 43 ER 893.

<sup>62</sup> (1854) 2 Sm & Giff 141, 65 ER 339 at 146, 341.

<sup>63</sup> See also *Meux v Bell* (1841) 1 Hare 73 at 85; 65 ER 955 at 960 where Sir James Wigram VC commented: “In the absence of notice the party claiming the prior incumbrance has not perfected his title ... if he fails to do this, and another person takes an incumbrance, and gives notice, the second person has acquired a perfect assignment, whilst the first equitable assignment is imperfect.” The point to note here is his Lordship’s use of “incumbrance” and “assignment” as being interchangeable. The suggestion is that an assignment creates an incumbrance on property rather than a transfer of property.

<sup>64</sup> (1854) 5 DeGM & G 320 at 322; 43 ER 893 at 894.

<sup>65</sup> (1823) Turn & R 459; 37 ER 1177.

<sup>66</sup> (1823) Turn & R 459 at 470; 37 ER 1177 at 1181.

<sup>67</sup> (1823) Turn & R 459 at 476; 37 ER 1177 at 1183.

Although the terminology is not entirely consistent it would appear from these cases (and others<sup>68</sup>) that the effect of an equitable assignment of a *chose in action* is to create an equitable interest in the debt in favour of the assignee. The assignment does not operate as an absolute transfer of the *chose in action* but rather as an appropriation in favour of the assignee.<sup>69</sup> This interest is a security interest whereby the debtor holds the debt on trust subject to the charge in favour of the assignee. An equitable assignment can be seen as equating to what modern equity judges call an equitable charge. The assignee has a right to have assets realised even though no title or possession of the asset has been transferred to the assignee. The assignor remains the legal owner of the asset and the assignee is the beneficiary in equity.

## V. JUDICATURE ACT 1873

### (a) *The problem created by dual systems of law – the road to resolution*

The different laws and remedies applied by, respectively the Court of Chancery and the common law courts, were recognised as a major problem in terms of the administration of justice throughout the first three-quarters of the nineteenth century. A great many Royal Commission reports<sup>70</sup> were produced in this period which wrestled with the problem of how

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<sup>68</sup> Reference may also be made to eg *Adams v Claxton* (1801) 6 Ves Jun 226; 31 ER 1024 where Grant MR was looking for evidence of an “appropriation” of the *chose in action* – “an assignment: a lien, giving that creditor a right to a specific application in his favour” (at 230; 1026). In a further report of the case at 1 Ves Jun Supp 590 at 591; 34 ER 935 at 935, it is stated in the context of an assignment that: “where personalty is so ‘ear-marked’ as to be capable of being clearly distinguished, Courts of Equity will be disposed to consider it as appropriated in favour of *cestuis que trust*.” In *Row v Dawson* (1749) 1 Ves Sen 331; 27 ER 1064 there is a reference to the effect of an assignment of a *chose in action* as being “a credit on this fund” (at 332; 1064) per the Lord Chancellor, Lord Hardwicke. There is also reference to the assignment providing a “specific lien” on the fund (at 331; 1064). The assignment of a debt in *Smith v Everett* (1792) 4 Bro CC 64; 29 ER 780 was described by Lord Commissioner Eyre as one where “there could not be a stronger appropriation of the fund” and the court “declared that the assignees had a specific lien on the monies” (at 67; 782). In *Watson v Duke of Wellington* (1830) 1 Russ & M 602; 39 ER 231, counsel referred in argument to the letter in question creating “an equitable charge” (at 603; 232) and (even without the letter), counsel argued the circumstances would be sufficient “to create a charge on the fund” as “writing is not necessary to create a trust of personal property” (at 604; 232). Sir John Leach MR (at 605; 232) stated: “In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund.” In *Hirsch v Coates* (1856) 25 LJ CP 315 it was explained that a garnishee could not attach a debt which had previously been assigned in equity (“If the debtor has charged or parted with his interest in the debt, then except as to any excess beyond the amount of the charge, no interest will to the person obtaining the order” per Jervis CJ at 317).

<sup>69</sup> See eg *Crowfoot v Gurney* (1832) 9 Bing 372; 131 ER 655 – the effect of an equitable assignment was such that the assignee “might have gone into a court of equity to compel a formal assignment” per Tindal CJ at 375; 656.

<sup>70</sup> See eg the *Commission to inquire into the Practice of Chancery* (28<sup>th</sup> February 1826 (HC 143 (1826) xv, xvi); the first *Commission to inquire into the Practice and Procedure of the Superior Courts of Common Law at Westminster* which issued three reports (18<sup>th</sup> February 1829, HC 26 (1829) ix; 26<sup>th</sup> February 1830 HC 123 (1830) xi, 547; and 6<sup>th</sup> July 1831, HC 92 (1831) x, 375); the second *Commission to inquire into Process, Practice and System of Pleading in the Superior Courts of Common Law at Westminster* which issued three reports (30<sup>th</sup> June 1851 [1389] HC (1851) xxii, 567, 30<sup>th</sup> April 1853 [1626] HC (1852-3) xl, 701 and 20<sup>th</sup> February 1860 [2614] HC (1860) xxxi, 341; the *Commission to inquire into the Process, Practice and System of Pleading in the Court of Chancery* which produced three reports (27<sup>th</sup> January 1852 [1437, 1454] HC (1852) xxi, 1, 333, 11<sup>th</sup> January 1854 [1731] HC (1854) xxiv, 1, 14<sup>th</sup> April 1856 [2064] HC (1856) xxii, 1); the *Commission to inquire into the Mode of Taking Evidence in Chancery and its Effects* (18<sup>th</sup> August 1859, [2698] HC (1860) xxxi, 279); and most famously the *Judicature Commission* which issued five reports (25<sup>th</sup> March 1869 [4130] HC (1868-9) xxv, 1, 3<sup>rd</sup> July 1872 [C 631 and C 631-1] HC (1872) xx, 217, 245, 21<sup>st</sup> January 1874 [C 957 and C 957-1] HC (1874) xxiv, 1, 13, 25<sup>th</sup> March 1874, [C 984 and C 984-1] HC (1874) xxiv, 183, 191, 10<sup>th</sup> July 1874 [C 1090] HC (1874) xxiv, 307.

best to unify the administration of justice. Common law courts were provided with some powers equivalent to those of the Court of Chancery, such as the power to issue injunctions and to order specific performance.<sup>71</sup> To similar effect the Court of Chancery was permitted to exercise certain common law powers such as awarding damages.<sup>72</sup> Two distinct legislative approaches might be identified from this period. One approach was what might today be called the “Big Bang” approach which considered uniting all the laws and courts into a unitary system of justice. The other approach, which might be labelled a “piecemeal” approach was to pick off various specific issues where a conflict arose between the common law and equity and to legislate only for those specific circumstances.

An example of the “Big Bang” approach was the High Court of Justice Bill 1870 which ultimately failed to pass. Clause 9 of the Bill explicitly provided that “Equity, or the rules and principles which govern the Court of Chancery in the administration of justice, shall henceforth be blended and united with the common law of England, and (so far as there is any difference) shall control and modify the same and supply the defects thereof... .” This proposed solution did not look at individual instances where the common law and equity conflicted or where one was deficient in some regard but instead looked to a general unification of both systems with equity prevailing where a conflict did exist.

There were a number of specific problem areas of law identified which showed that the common law and equity were in conflict. One of these areas, which became subject to the “piecemeal” approach was the law on the assignments of *choses in action*. Until 1873, *choses in action* were not generally assignable at law.<sup>73</sup> Throughout the nineteenth century various statutes specifically made certain *choses in action* capable of assignment at law.<sup>74</sup> These specific instances of legal assignments were not free from difficulty. For example, it was recognised that the wording of the Policies of Assurance Act 1867,<sup>75</sup> which permitted an absolute assignment of a life assurance policy, might not include a mortgage of such a policy.<sup>76</sup>

The Judicature Commission, which inquired into the law and arrangements for distributing and transacting judicial business in the superior courts of common law and equity, produced five reports.<sup>77</sup> Their work was eventually given effect by the Judicature Acts 1873 and 1875.<sup>78</sup> The approach of the Judicature Act 1873 to the different systems of law was part “Big Bang” and part “piecemeal”. Section 25 listed 10 specific examples where the

<sup>71</sup> See eg the Common Law Procedure Acts 1852 (15 & 16 Vict, c 76), 1854 (17 & 18 Vict, c 15) and 1860 (23 & 24 Vict, c 126).

<sup>72</sup> Chancery Amendment Act 1858 (21 & 22 Vict, c 27), known as Lord Cairns’ Act, for a discussion of which see eg J. Jolowicz “Damages in Equity: A Study of Lord Cairns’ Act” (1975) 34 *Cambridge Law Journal* 224.

<sup>73</sup> If not capable of being assigned under a particular statute, a gift of a legal *chose in action* could only be made at law in the form of a power of attorney providing authority to the donee to use the donor’s name in claiming for his own benefit the *chose in action* - see eg *Winch v Keeley* (1787) 1 TR 619, 99 ER 1284, *Gerard v Lewis* (1866-7) LR 2 CP 305.

<sup>74</sup> See eg for bills of exchange, cheques and promissory notes the Bills of Exchange Act 1882 (45 & 46 Vict, c 61), ss 31, 38, 73, 83 and 84; for indorsed bills of lading the Bills of Lading Act 1855 (18 & 19 Vict, c 111, s1); for life assurance policies the Policies of Life Assurance Act 1867 (30 & 31 Vict, c 144); for marine assurance policies the Marine Insurance Act 1868 (31 & 32 Vict, c 86); for railway bonds (8 Vict, c 16, s 46); for East India bonds the East India Company Bonds Act 1811 (51 Geo III, c 64, s 4).

<sup>75</sup> 30 & 31 Vict, c 144.

<sup>76</sup> See the discussion of this problem in “The Policies of Assurance Act 1867” (1867) 14(1) *Journal of the Institute of Actuaries and Assurance Magazine* 46 at 47.

<sup>77</sup> The Judicature Commission’s five reports were produced between 1869 and 1874: 25<sup>th</sup> March 1869 [4130] HC (1868-9) xxv, 1, 3<sup>rd</sup> July 1872 [C 631 and C 631-1] HC (1872) xx, 217, 245, 21<sup>st</sup> January 1874 [C 957 and C 957-1] HC (1874) xxiv, 1, 13, 25<sup>th</sup> March 1874, [C 984 and C984-1] HC (1874) xxiv, 183, 191, 10<sup>th</sup> July 1874 [C 1090] HC (1874) xxiv, 307.

<sup>78</sup> Respectively the Supreme Court of Judicature Act 1873 (36 & 37 Vict, c 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vict, c 77).

law and equity<sup>79</sup> were inconsistent and provided a solution to those inconsistencies. It also contained a general default rule in s 25(11) whereby if, in any other cases, the common law and equity conflicted, the rule in equity would prevail.

*(b) Legal assignments become possible*

Section 25(6) of the Judicature Act 1873 introduced into law a power generally to assign legal *choses in action*. This provision is effectively unchanged in the current s 136 of the Law of Property Act 1925. The wording of the provision appears to have passed through Parliament unamended without comment. For present purposes it is important to note that it allows a legal assignment of a legal *chose in action* if the assignment is in writing and if written notice is given to the debtor of the assignment. Once notice is given, the assignment is effective to “pass and transfer the legal right” to the *chose in action*, subject to equities, along with “all legal rights and other remedies”. The wording of the subsection does contain a conundrum. It applies to an “absolute assignment ... (not purporting to be by way of charge only)”. Subsequent case law has often struggled fully to explain what these words in parenthesis mean.<sup>80</sup>

The subsection operates to place the assignee into exactly the same position as the assignor was previously. The assignee is the legal owner of the *chose in action* and can sue in his or her own name to enforce the *chose in action*. He or she is the legal owner.<sup>81</sup> The *chose in action* has been fully transferred (subject to equities). A legal assignment under this provision operates by way of transfer of title to the *chose in action*.<sup>82</sup>

The problem created by its wording is the qualification : “(not purporting to be by way of charge only)”. If it is argued that all assignments of a *chose in action* involve a transfer of title to the assignee, this phrase appears to be misconceived or at best unnecessary in its context. A charge does not involve a transfer of title<sup>83</sup> and so it would seem unnecessary to state explicitly that an assignment under this subsection could ever purport to be by way of charge. Only if an assignment is capable of being a charge would this phrase be a sensible addition.

*(c) Equitable assignments “purporting to be by way of charge only”*

One possible solution to the conundrum created by the wording of s 25(6), which the court suggested in *National Provincial Bank of England v Harle*,<sup>84</sup> was subsequently overruled. It had been suggested in *Harle* that if an assignment was by way of mortgage, that is, the assignment was not an out-and-out transfer or sale but was limited in value to the secured debt, the assignment was not absolute but was by way of charge only. Subsequently the court

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<sup>79</sup> Or the law of admiralty – see s 25(9).

<sup>80</sup> See the discussion below at V (c).

<sup>81</sup> The subsection is often said to be procedural only in that it permits the assignee to sue at common law in his or her own name without the need to include the assignor, which was and arguably remains, a requirement when enforcing equitable assignments (see eg J. Edelman and S. Elliott “Two conceptions of equitable assignment” (2015) 131 *Law Quarterly Review* 228; *Read v Brown* (1888) 22 QBD 128; *Tolhurst v Associated Portland Cement Manufacturing Co Ltd* [1902] 2 KB 660 and *Bennett v White* [1910] 2 KB 643).

<sup>82</sup> It permits an assignment of any *chose in action* which is capable of assignment in equity and so covers, for example, future *choses in action* as well as those presently enforceable (*Brice v Bannister* (1878) 3 QBD 569).

<sup>83</sup> See eg *Burlinson v Hall* (1884) 12 QBD 347 per Day J at 350; *Re Cosslett Contractors Lt* [1998] Ch 495 508F-G per Millett LJ and *Re Bank of Credit and Commerce International S.A.* [1998] AC 214 at 226 per Lord Hoffman.

<sup>84</sup> (1881) LR 6 Ex D 626.

in *Burlinson v Hall*<sup>85</sup> pointed out that the decision in *Harle* confuses the meaning of the terms mortgage and charge. The meaning of the word “absolute” in the subsection is to be contradistinguished from a “conditional” assignment not from a sale. An assignment which was by mortgage was still absolute as long as the title vesting in the mortgagee vested “there and then.”<sup>86</sup> The assignment of the *chose in action* transferred the *chose in action* to the mortgagee who could realise it in his own name. Just because the mortgagor could redeem the mortgage and demand a re-conveyance of the *chose in action* did not prevent the assignment to the mortgagee being absolute in character. The court pointed out that the assignment was not a charge which “differs altogether from a mortgage. By a charge the title is not transferred, but instead the person creating the charge merely says that out of a particular fund he will discharge a particular debt.”<sup>87</sup> In *Tancred v Delagoa Bay and East Africa Railway Co.*,<sup>88</sup> the Divisional Court approved the decision in *Burlinson* effectively overruling *Harle*.

The reference to an assignment which purports to be a “charge” appears to be incongruous in the context of legal assignments, which by definition always involve a transfer of title and are therefore either out-and-out transfers or transfers by way of mortgage. They can never be charges. Although the Judicature Act 1873 introduced the possibility of a legal assignment of a legal *chose in action* it did not outlaw equitable assignments.

As suggested above, the effect of an equitable assignment was to create a charge over the *chose in action*. The wording of s 25(6) is readily comprehensible in light of this. If the assignment is by way of charge only it will still be operative but will operate outside s 25(6). If it fails to satisfy the requirements of the subsection, for example, because notice is not provided to the debtor, it will not be a legal assignment but will qualify only as an equitable assignment, and by definition purport to be by way of charge only. As was stated in *Durham Brothers v Robertson*<sup>89</sup> by Chitty LJ: “It is plain that every equitable assignment in the wide sense of the term as used in equity is not within [s 25(6)].”<sup>90</sup>

It is also tolerably clear that subsequent to the Judicature Act 1873, the courts continued to recognise an equitable assignment as creating a charge over the debt assigned in equity. The discussion, and terminology used by the Court of Appeal, in *Gorringe v Irwell India Rubber and Gutta Percha Works*<sup>91</sup> is entirely supportive of this view. Cotton LJ stated: “When there is a contract for value between the owner of a chose in action and another person which shews that such person is to have the benefit of the chose in action, that constitutes a good charge on the chose in action.”<sup>92</sup> Fry LJ commented on the charge document in question: “First, it is said that it created no charge at all. I think that it did. It made the writer of the instrument a trustee of the debt for the Appellants, and therefore it is equivalent to an equitable assignment.”<sup>93</sup>

The overwhelming volume of case law suggests that an equitable assignment of a debt creates a charge over the debt which the assignor holds on trust for the assignee. Equitable assignments are by way of charge only and therefore outside the statutory assignment machinery. The wording of the Judicature Act 1873 supports the argument that an equitable assignment operates by way of charge.

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<sup>85</sup> (1884) 12 QBD 347.

<sup>86</sup> (1884) 12 QBD 347 per Day J at 350.

<sup>87</sup> (1884) 12 QBD 347 per Day J at 350.

<sup>88</sup> (1889) 23 QBD 239.

<sup>89</sup> [1898] 1 QB 765.

<sup>90</sup> [1898] 1 QB 765 at 771.

<sup>91</sup> (1886) 34 Ch D 128.

<sup>92</sup> (1886) 34 Ch D 128 at 134.

<sup>93</sup> (1886) 34 Ch D 128 at 136.

## VI. WHAT TYPE OF EQUITABLE CHARGE IS CREATED BY AN EQUITABLE ASSIGNMENT?

In the leading contemporary text, *Fisher on Mortgages*<sup>94</sup> dating from 1876, shortly after the Judicature Acts, the learned author explains that in English law there are two types of hypothecation (*hypotheca* being a non-possessory security interest imported into English law from Roman Law) which vest no absolute property in a creditor:

“... nor any right of possession, but a right of realization by judicial process in case of non-payment of the debt at the time fixed. This kind of security may be: - an Ordinary Hypothecation [as opposed to a maritime hypothecation], in the form of –

A *charge* upon property, which does not imply a personal debt, but confers a mere right of realization by judicial process ...; or

An *equitable assignment*, which is an appropriation, for the payment of a debt, of property of the debtor in the hands of a third person...”

*Fisher* notes that absolute assignments under s 25(6) “transfer the legal right in the property ... and are therefore not strictly hypothecations.”<sup>95</sup> As support for these statements, *Fisher* cites *Stainbank v Shepard*<sup>96</sup> where Parke B. explained something of the nature of *hypotheca*:

“this power does not extend to more than hypothecation, - well known in the civil law, and distinguished from a mortgage, as well as a pledge or pawn at common law the former transfers the property; the latter, a lien on the chattel, and is void without actual possession: but hypothecation gives only a right, to be enforced against the subject of it through the medium of process.”<sup>97</sup>

*Fisher* also cites (amongst other cases<sup>98</sup>) *Smith v Everett*<sup>99</sup> where a direction by the assignor to pay monies to be received in the future to specified assignees was held to create a “lien”<sup>100</sup> on the fund: “There could not be a stronger appropriation of the fund than this.”<sup>101</sup>

It is interesting to note that both Professor Pennington<sup>102</sup> and Professor Goode<sup>103</sup> have tied the juridical nature of the floating charge to the *hypotheca*.<sup>104</sup> A number of cases<sup>105</sup> have

<sup>94</sup> W.R. Fisher *The Law of Mortgage and other securities upon property* (3<sup>rd</sup> ed Vol 1, London: Butterworths, 1876) at p. 7.

<sup>95</sup> W.R. Fisher *The Law of Mortgage and other securities upon property* (3<sup>rd</sup> ed Vol 1, London: Butterworths, 1876) at 7. It is interesting to note that the Times of 4th July 1872 at page 11 announced the appointment of a new secretary to the Judicature Commission. He was Robert Alexander Fisher and is described in the Times as “the author of several legal works, including a Digest in five volumes of the Law of Mortgages.” The Times mistakes R.A. Fisher for W.R. Fisher who was the author of the Digest. As seen from the quotation in the text, W.R. Fisher clearly understood the difference between a mortgage and a charge. He understood very clearly that an equitable assignment did not involve a transfer of title but instead created a security interest in the assignee akin to a charge.

<sup>96</sup> (1853) 13 CB. 418, 138 ER 1262.

<sup>97</sup> (1853) 13 CB. 418, 138 ER 1262 at 442-443, 1271.

<sup>98</sup> *Burn v Carvalho* (1839) 4 My & C 690; 41 ER 265; *Ex parte Steward* (1845) 3 M D and De G265, *Williams v Everett* (1811) 14 East 582; 104 ER 725 and *Baron v Husband*; (1833) 4 B & Ad 611; 110 ER 586.

<sup>99</sup> (1792) 4 Bro C C 64; 29 ER 780.

<sup>100</sup> (1792) 4 Bro C C 64; 29 ER 780, at 67; 782 per Lord Commissioner Eyre.

<sup>101</sup> (1792) 4 Bro C C 64; 29 ER 780, at 67; 782 per Lord Commissioner Eyre.

<sup>102</sup> Pennington “The Genesis of the Floating Charge” (1960) 23 *Modern Law Review* 630 at 634.

<sup>103</sup> Goode “The Exodus of the Floating Charge” in *Corporate and Commercial Law: Modern Developments* (ed. Feldman and Meisel) (London: Lloyds of London, 1996) 193 at 195.

<sup>104</sup> For an alternative view of the development of the law relating to secured lending in England see R. Gregory and P. Walton “Fixed and Floating Charges - A Revelation” [2001] *Lloyds Maritime and Commercial Law Quarterly* 123.

<sup>105</sup> See eg *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 at 101 and 106; *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324 at 1337, 1338, 1339 and 1340; *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] 1 QB 1 at 5H and 6H; and *George Barker (Transport) Ltd v Eynon* [1974] 1 WLR 462 at 467G, 468B, 472G and 475B. Where there was an equitable assignment of debts in the context of a

explained that prior to crystallisation, a floating charge is inchoate in that the company is able to continue to deal in the ordinary course of business with the assets subject to the charge. Once the floating charge crystallises, becoming fixed in nature, the assets subject to the charge are said to be effectively assigned in equity. An equitable charge is, or causes, an equitable assignment of the charged assets. The courts treat an equitable charge as an equitable assignment.<sup>106</sup>

It is very easy to see that the effect of an equitable assignment of a *chose in action* operates very much like a floating charge.<sup>107</sup> The assignor creates a security interest over the *chose in action* in favour of the assignee. Until notice is provided to the debtor, the *chose in action* remains under the control of the assignor. This is similar to the situation where a company executes a floating charge. Only upon crystallisation are the charged assets taken outside of the chargor's control. With an equitable assignment, the debtor is entitled to pay the debt owed, in the ordinary course of business, to the assignor until the debtor receives notice of the assignment in favour of the assignee<sup>108</sup> (in the same way as a debtor whose debt is subject to a floating charge). The effect of an equitable assignment, whether described as creating a charge, a lien, an *hypotheca* or a trust in favour of the assignee, is effectively similar to a floating charge. All are, in *Fisher's* words, forms of hypothecation. All are forms of security.

In modern day invoice discounting arrangements, an equitable assignment by a company permits the company to continue to collect the debts (the debtor being wholly unaware of the arrangement) and although the company may have contractual restrictions upon it as to how it deals with the proceeds of those debts, the power to collect and to pay those debts to the assignee suggests sufficient licence to make the security floating rather than satisfying the more stringent requirements of a fixed charge.<sup>109</sup> Without notice being served on the debtor, there is nothing which stops the assignor from effectively assigning the same debts to others.<sup>110</sup> Individual invoice discounting arrangements may or may not be found sufficiently restrictive to qualify as a fixed charge. It is clearly arguable that if, as is usual, an assignor is contractually required to pay the proceeds of debts, assigned in equity, into a particular bank account over which only the assignee has control, sufficient control is being

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securitisation the Court of Appeal accepted that the equitable assignment created a charge (*Titan Europe 2006-3 plc v Colliers International UK plc* [2015] EWCA Civ 1083 at [26 – 27]).

<sup>106</sup> See eg *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 at [65] where Lawrence Collins LJ refers to: “the assignment of the debt to the debenture holder which took place (as a matter of English law) on crystallisation of the floating charge.”

<sup>107</sup> The classic statement of how a floating charge operates is often taken from Romer LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 295: “(i) If it is a charge on a class of assets of a company present and future; (ii) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (iii) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.”

<sup>108</sup> It was said by Sir Thomas Plumer MR in *Dearle v Hall* (1828) 3 Russ 1 at 12; 38 ER 475 at 479, in the context of an assignment of an equitable interest that “wherever it was intended to complete a transfer of a chose in action, there was a mode of dealing which a court of equity considered tantamount to possession, namely, notice given to the legal depositary of the fund.” This requirement for notice in the context of *choses in action* is the equivalent of control of a bank account required in the modern cases dealing with fixed charges on book debts such as *Re Spectrum Plus Ltd* [2005] 2 AC 680.

<sup>109</sup> See eg *Re Spectrum Plus Ltd* [2005] 2 AC 680 and *Re Brumark Investments Ltd* [2001] 2 AC 710.

<sup>110</sup> Lord Macnaghten in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 explained that where no notice is given to the debtor of an assignment, the debtor may pay the assignor. Until notice is given there is no irrevocable instruction to the debtor. “If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor.” The debt remains within the power of the company until such notice is served.



exercised to constitute the charge as fixed rather than floating. This would be a question of fact in each case.<sup>111</sup>

Whether the equitable assignment of debts is seen as creating a fixed or a floating charge it will generally still need registration under the Companies Act 2006 otherwise it will be void against any subsequent liquidator, administrator or creditors of the company.<sup>112</sup>

## **VII. EFFECT OF GIVING NOTICE TO THE DEBTOR AND PRIORITY UNDER INSOLVENCY LEGISLATION**

### *(a) Notice to the debtor converts the equitable assignment (charge) into absolute ownership*

The practice of invoice discounters is to take an equitable assignment of a company's debts but not to provide notice to the company's debtors of the assignment unless the company defaults or enters an insolvency process. In equity, notice to the debtors is not necessary as between the assignor and the assignee but it is necessary to protect the assignee's priority.<sup>113</sup> Clearly, notice provided by the assignee to the debtors will be effective under s 136 of the Law of Property Act 1925 to convert the equitable assignment into a legal assignment and to constitute the assignee the legal owner of the debts. Absolute ownership at law of the debts will be effectively transferred by the completion of the statutory assignment requirements. There is no time limit within which notice under s 136 must be given.<sup>114</sup>

### *(b) Notice to the debtor after commencement of formal insolvency*

An example of an attempt to convert an equitable assignment into a legal assignment by notice to the debtor, in the context of an insolvent company is *Gorringe*.<sup>115</sup> The Court of Appeal explained that notice to the debtor is unnecessary for an equitable assignment to be complete as between the assignor and the assignee.<sup>116</sup> At the time of *Gorringe*, 1886, there was no requirement to register publicly company charges. The charge in *Gorringe* created by the equitable assignment was effective when it was made. The company was subsequently wound up by the court. After the date of the winding up petition, notice of the assignment was given by the assignee to the debtor in order to convert the equitable assignment into a legal assignment. The question before the Court was whether the assignee had priority in the liquidation due to either its initial equitable assignment or its subsequent attempt to convert it into a legal assignment. The Court held that as the notice to the debtor came after the petition, the assignee could not rely upon its legal assignment as any disposition of company property after the date of the petition would be void under s 153 of the Companies Act 1862 (the predecessor to today's s 127 of the Insolvency Act 1986).<sup>117</sup> The assignee was entitled to rely

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<sup>111</sup> See eg the application of the *Spectrum* principles in eg *Re Harmony Care Homes Ltd* [2010] BCC 358.

<sup>112</sup> Section 859H Companies Act 2006.

<sup>113</sup> See eg *Hobson v Bell* (1839) 2 Beav 17 at 23; 48 ER 1084 at 1086.

<sup>114</sup> *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128; *Walker v Bradford Old Bank* (1884) 12 QBD 511 and *Bateman v Hunt* [1904] 2 KB 530.

<sup>115</sup> (1886) 34 Ch D 128.

<sup>116</sup> (1886) 34 Ch D 128 at 132 per Cotton LJ

<sup>117</sup> An interesting older bankruptcy case which may be compared with *Gorringe* is *Re Atkinson* (1851) 4 De G & Sm 548; 64 ER 951; affirmed (1852) 2 De GM & G 140; 42 ER 824 where an assignment by an insolvent debtor after he had entered insolvency was held to be valid as the assignee did not have notice of the insolvency at the time of the insolvency. There was at the time no doctrine of constructive notice of insolvencies which had appeared in the Gazette and no equivalent of the current provision in s 284 of the Insolvency Act 1986 which

on the initial equitable assignment which pre-dated the winding up and was valid without the need for registration.

*(c) Consequences under current statutory registration regime*

Under the current regime, it is submitted that an equitable assignment of a debt, as it operates by way of charge, would be registrable under the Companies Act within 21 days of its creation otherwise it would be void against any subsequent liquidator, administrator or creditor of the company.<sup>118</sup> If an invoice discounter takes an equitable assignment of a company's book debts, that assignment will be void if it is not registered under the Companies Act.

If notice is given to the company's debtors of the assignment (thus perfecting the statutory assignment under s 136 of the Law of Property Act 1925) the assignee becomes the legal owner of the debts and may enforce them in its own name. If the notice is served on the debtors after the date of a winding up petition, the attempt to transfer the debts from the company to the assignee will be void under s 127 of the Insolvency Act 1986.<sup>119</sup>

A similar result would be likely if the notice is served after the commencement of an administration. In that case the administration moratorium prevents enforcement of any security without leave of the court or consent of the administrator.<sup>120</sup> The effect of serving a notice to perfect the legal assignment would be akin to foreclosure of a mortgage (where a debtor's equity of redemption is cancelled and the mortgagee becomes legal owner)<sup>121</sup> and would arguably fall within the moratorium.

## VIII. CONCLUSION

An equitable assignment of a legal *chose in action* is not the same as a legal assignment. A legal assignment effectively transfers all the rights of the assignor to the assignee who may enforce those rights in place of the assignor. An equitable assignment does not effect such a transfer of rights but instead creates equitable rights in the assignee. The assignor holds the benefit of the *chose in action* on behalf of the assignee whose interest over the *chose in action* is in the form of an equitable charge. All equitable assignments of legal *choses in action* create charges over those *choses in action*. They do not operate by way of transfer of the legal *chose in action*. Although the nature of the rights given by an equitable assignment might be seen as a purely academic issue, it could not be further from the truth. Billions of pounds are invested in U.K. businesses with the financier having the comfort of an equitable assignment of book debts. The rights of those financiers, on the insolvency of the assignor, turn upon whether they are seen as being absolute owners or merely chargees of those debts.

If written notice of an equitable assignment of a legal *chose in action* is given to the debtor, the effect of s 136 of the Law of Property Act 1925 is to convert the equitable assignment (or charge over the *chose in action*) into absolute legal ownership (subject to equities). The act of giving notice, under the statutory machinery, is sufficient to convert an equitable charge into legal ownership. The notice acts as a disposition of the assignor's

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avoids dispositions of property by debtors once a bankruptcy has commenced (the individual insolvency equivalent of s 127 of the Insolvency Act 1986).

<sup>118</sup> Sections 859A and 859H Companies Act 2006.

<sup>119</sup> Section 112 Insolvency Act 1986 permits a voluntary liquidator to apply to court to exercise any power the court could exercise in a compulsory winding up (for a consideration of how wide and general the court's discretion is under s 112 see eg *Re Dicksmith (Manufacturing) Ltd* [1999] 2 BCLC 686).

<sup>120</sup> Insolvency Act 1986, Sch B1, para 43.

<sup>121</sup> On the remedy of foreclosure see eg *Re Owen* [1894] Ch 220 and the very clear explanation of the remedy in R. Calnan *Taking Security Law and Practice* (2<sup>nd</sup> ed, Bristol: Jordans, 2011) at paras 8.53- 8.66.

property as the legal ownership is transferred from the assignor to the assignee. There is no time limit at law restricting when this conversion may take place but under insolvency legislation, any attempt to dispose of company property will be ineffective once insolvency proceedings for compulsory liquidation or administration are under way.

The majority practice of receivables financiers, in conducting business as invoice discounters, is to take equitable assignments of book debts but not to provide notice to debtors of those assignments until the assignor is nearing or entering insolvency. If invoice discounters fail to give notice to debtors prior to their assignor entering formal insolvency proceedings, such as compulsory liquidation or administration, the invoice discounters' interest cannot be converted into absolute ownership under s 136 of the Law of Property Act 1925. They will remain as equitable assignees with the benefit of an unregistered charge over the debts which will be void in the assignor's insolvency and reduce their priority standing to that of unsecured creditor.

The timing of the notice to the debtor is therefore critical. If given prior to the insolvency, the invoice discounter will be safe as it will be the owner of the debts. If given after the insolvency, the invoice discounter will be a lowly unsecured creditor proving in the assignor's insolvency.

It is perhaps time for the U.K. government to consider how the law should deal with the interests of receivables financiers. Although it is perfectly reasonable for receivables financiers to protect their interests in the way they do, it is inconsistent with over a hundred years of Parliamentary policy to permit such a financier to have the benefit of a secret document (that is, an unregistered equitable assignment) which remains undetectable until the company becomes insolvent. At this point, by giving notice to the company's creditors, the financier is able to take legal title to all the company's book debts at the expense of the company's general body of creditors. It is common for such financiers not only to be repaid their investment with interest but also to charge significant extra fees.

The history of security law suggests that there is a cycle whereby financiers find legal mechanisms to protect fully their interests to the detriment of other creditors. Parliament has frequently stepped in to create an even balance for all stakeholders in an insolvency.<sup>122</sup> Parliament may wish to look at debt factoring and invoice discounting and consider explicitly classifying such agreements as security interests registrable under the Companies Act.<sup>123</sup> This would potentially provide more transparency in corporate dealings and also free up assets so that more money is paid to unsecured creditors and is available to insolvency office holders who wish to consider rescuing a distressed business. The historical analysis provided above suggests that the current state of the law appears to turn on some fine conceptual distinctions. The overwhelming priority currently claimed by receivables financiers is a "real world" issue. A legislative categorisation of such interests as security interests requiring public registration may serve to introduce a more balanced approach to such financing. This would also ensure that the UK remains in step with other progressive nations.

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<sup>122</sup> See, for example, the recommendation in 1908 by the Muir Mackenzie Committee (Cd 4068 at para 150) that assignments of all of an individual's debts should be registered as a bill of sale. The Committee noted that secret assignments of all of an individual's debts did "operate prejudicially". Following this recommendation, s 43 Bankruptcy Act 1914 made a general assignment by an individual (or partnership) of present or future book debts subject to registration under the Bills of Sale 1878 Act. The modern incarnation of s 43 is to be found in s 344 Insolvency Act 1986

<sup>123</sup> See the suggestion of the City of London Law Society's Financial Committee which recommends a voluntary code for registration of receivables financing agreements which would have an effect on priorities: [http://www.citysolicitors.org.uk/attachments/article/121/MARK%20UP%20-%20Secured%20Transactions%20Code%20-%20Discussion%20draft%20\(July%202016\).pdf](http://www.citysolicitors.org.uk/attachments/article/121/MARK%20UP%20-%20Secured%20Transactions%20Code%20-%20Discussion%20draft%20(July%202016).pdf) (last accessed 7<sup>th</sup> September 2018).

The current practice of receivables financiers might be viewed in a manner consistent with the observations of Lord Esher MR from the end of the nineteenth century, in relation to what appeared to be a new type of business involving the assignment of significant quantities of debts, which his Lordship suggested: “might perhaps be considered by some an evil.”<sup>124</sup> It would be timely for Parliament once again to consider how the market in book debts should be regulated.

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<sup>124</sup> *Comfort v Betts* [1891] 1 QB 737 at 739.